U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K-E-P-M-

DATE: JAN. 5, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF INADMISSIBILITY

The Applicant, a native and citizen of Canada currently residing in the United States, has applied for an immigrant visa. A foreign national seeking to be admitted to the United States as an immigrant must be "admissible" or receive a waiver of inadmissibility. The Applicant has been found inadmissible for a crime involving moral turpitude and seeks a waiver of that inadmissibility. *See* Immigration and Nationality Act (the Act) section 212(h), 8 U.S.C. § 1182(h). U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver if refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives or, where the activities for which the foreign national is inadmissible occurred at least 15 years ago, if the foreign national's admission would not be contrary to the national welfare, safety, or security of the United States, and the foreign national has been rehabilitated.

The Director of the Nebraska Service Center denied the application. The Director noted the Applicant's inadmissibility for a crime involving moral turpitude and determined that extreme hardship to his spouse had been established. Nevertheless, the Director concluded that the Applicant was subject to the heightened discretionary standard for violent or dangerous crimes and had not established that he merited a favorable exercise of discretion.

On appeal, the Applicant submits additional documentation and asserts that his conviction is not a crime involving turpitude and that even if it is, he is eligible for a waiver of inadmissibility because the conviction that rendered him inadmissible occurred more than 34 years ago; his admission would not be contrary to the national welfare, safety, or security of the United States; and he has been rehabilitated. Alternatively, the Applicant contends that he has established extreme hardship to a qualifying relative. The Applicant also asserts that he should not be subject to the heightened discretionary standard for violent or dangerous crimes, but if he is subject to the heightened standard, he merits a favorable exercise of discretion.

Upon *de novo* review, we will sustain the appeal.

I. LAW

Any foreign national convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime is inadmissible. Section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A).

Individuals found inadmissible under section 212(a)(2)(A) of the Act for a crime involving moral turpitude may seek a discretionary waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h). Where the activities resulting in inadmissibility occurred more than 15 years before the date of the application, a waiver is available if admission to the United States would not be contrary to the national welfare, safety, or security of the United States, and the foreign national has been rehabilitated. Section 212(h)(1)(A) of the Act. A waiver is also available if denial of admission would result in extreme hardship to a United States citizen or lawful permanent resident spouse, parent, son, or daughter. Section 212(h)(1)(B) of the Act. If, however, the foreign national's conviction is for a violent or dangerous crime, USCIS may not grant a waiver unless the foreign national also shows "extraordinary circumstances" with the final stipulation that, even if such a showing is made, the waiver can still be denied because of the gravity of the offense. 8 C.F.R. § 212.(7)(d).

II. ANALYSIS

The issues on appeal are whether the Applicant is subject to the heightened discretionary standard for a violent or dangerous crime and whether he merits a waiver as a matter of discretion. Upon review of the evidence in the record, including the evidence submitted on appeal, we find that a favorable exercise of discretion is warranted in his case.

With the appeal, the Applicant submits statements from himself and his spouse, academic documentation pertaining to his spouse, evidence of Medicaid enrollment documentation for his three children, family photographs, and mental health documentation pertaining to his spouse. With the waiver application, the Applicant submitted statements from himself and his spouse, biographic and immigration documents, criminal conviction records, financial and employment documentation, evidence of his spouse's participation in an advance degree program, letters in support, certificates issued to him, mental and medical health documentation, and evidence of the approval of the Form I-192, Advance Permission to Enter as a Nonimmigrant, on his behalf.

The record establishes that in 1991, the Applicant was convicted of theft, in violation of section 334 of the Canadian Criminal Code, and in 1992, he was convicted of breaking and entering and theft, in violation of section 348(1)(B). In 1993, the Applicant was convicted of breaking and entering with intent, assault with intent to resist arrest and assaulting a peace officer, in violation of sections 348(1)(A) and 270(1)(a) and (b) of the Canadian Criminal Code. The U.S. Department of State determined that the Applicant's convictions were for crimes involving moral turpitude.[1]

[1] The Applicant contends that the finding that his 1993 assault conviction involved moral turpitude is erroneous because

The Applicant requires a waiver under section 212(h) of the Act for his inadmissibility, and because his offenses occurred more than 15 years ago, he may establish eligibility for a waiver pursuant to either section 212(h)(1)(A) or section 212(h)(1)(B) of the Act. To meet the requirements of section 212(h)(1)(A) of the Act, the Applicant must show that 1) admission to the United States would not be contrary to the national welfare, safety, or security of the United States, and 2) the Applicant has been rehabilitated.

The record reflects that the Applicant has not had any additional criminal convictions since 1993, more than two decades ago, and there is no indication that the Applicant has been involved in any recent criminal activity. The record further indicates that he has a history of gainful employment, and letters from friends and family members state that he is a caring and responsible father to his three daughters. We find that the Applicant has been rehabilitated and that his admission would not be contrary to the national welfare, safety, or security of the United States. We also note that the Director determined that denial of the Applicant's admission would result in extreme hardship to his qualifying relative, who is his U.S. citizen spouse, and that finding does not appear to be in error. The Applicant has thus established that he is eligible for a waiver of inadmissibility pursuant to section 212(h)(1)(A) and section 212(h)(1)(B) of the Act.

We now consider whether the Applicant merits a waiver of inadmissibility as a matter of discretion. The burden is on the Applicant to establish that a waiver of inadmissibility is warranted in the exercise of discretion. *Matter of Mendez-Moralez,* 21 I&N Dec. 296, 299 (BIA 1996). The Director concluded that the Applicant did not merit a waiver in the exercise of discretion because he was subject to the heightened standard for violent or dangerous crimes. The words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not further defined in the regulation or case law. *See* 67 Fed. Reg. 78675, 78677-78 (December 26, 2002) (explaining that defining and applying the "violent or dangerous crime" discretionary standard is distinct from determination that a crime is an aggravated felony). Pursuant to our discretionary authority, we understand "violent or dangerous" according to the ordinary meanings of those terms. Black's Law Dictionary (9th ed. 2009), for example, defines *violent* as 1) "[o]f, relating to, or characterized by strong physical force," 2) "[r]esulting from extreme or intense force," or 3) "[v]ehemently or passionately threatening." It defines *dangerous* as "perilous, hazardous, [or] unsafe," or "likely to cause serious bodily harm." In determining whether a crime is a violent or dangerous crime for purposes of discretion, we are not limited to a categorical inquiry but may consider both the statutory elements and the nature of the actual offense. *See Torres-Valdivias v. Lynch*, 786 F. 3d 1147, 1152 (9th Cir. 2015); *Waldron v. Holder,* 688 F.3d 354, 359 (8th Cir. 2012).

The record indicates that the Applicant was convicted in 1993, at the age of 19, of assaulting a police officer during his arrest for involvement in breaking and entry at a school. Assault, as defined in

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his offense is analogous to simple assault, which the Board of Immigration Appeals has previously held is not a crime involving moral turpitude. He does not specifically contest that his convictions for theft and breaking and entering are crimes involving moral turpitude.

section 265(1) of the Canadian Criminal Code, can be through the intentional non-consensual application of force, an attempt or threat of non-consensual application of force, or the interference with a person while having a weapon. There is no indication that the Applicant caused any harm to the police officers involved in his arrest or that he possessed a weapon.

The Applicant asserts that assault is not a violent or dangerous crime because it can involve any direct or indirect application of force and does not require any harm. The Applicant further argues that there are more serious assault crimes under the Canadian Criminal Code that proscribe conduct that may be violent or dangerous, and the Applicant was not charged or convicted of any of these offenses. These offenses include assaulting a police officer with a weapon, causing bodily harm to a police officer, and aggravated assault of a police officer. The Applicant was convicted of assault, a crime that involved application of force or an attempt or threat to apply force, and this offense did not involve strong or intense physical force, infliction of bodily harm, or conduct likely to cause serious bodily harm. We therefore do not find that the Applicant's conviction was for a violent or dangerous crime subject to the heightened discretionary standard set forth in 8 C.F.R. § 212.(7)(d).

In determining whether a waiver should be granted as a matter of discretion, we must balance the adverse factors evidencing the Applicant's undesirability as a lawful permanent resident with the social and humane considerations presented to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. *Matter of Mendez-Moralez, supra,* at 300 (citations omitted). The adverse factors include the nature and underlying circumstances of the inadmissibility ground(s) at issue, the presence of additional significant violations of immigration laws, the existence of a criminal record, and if so, its nature, recency and seriousness, and the presence of other evidence indicative of bad character or undesirability. *Id.* at 301. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where residency began at a young age), evidence of hardship to the foreign national and his or her family, service in the U.S. Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to good character. *Id.*

The Applicant contends that he and his family will experience hardship were he unable to remain in the United States due to his inadmissibility. The Applicant's spouse states that she is currently finishing graduate school to become a primary care pediatric nurse practitioner and she relies on her husband to care for their three young children and maintain the home. She contends that without her husband's daily presence and support, she would not be able to complete her program and care for her children. The Applicant's spouse also states that raising three children, all under six years of age, while pursuing her degree is very difficult for her, and based on her past issues with depression, she needs her husband by her side.

In his own statement, the Applicant expresses remorse for his actions as a teenager and states he feels shame and regret. He contends that he learned his lesson and has not had any trouble with the police since that time. He states that being a stay-at-home father has been a huge benefit to his wife and children and he is grateful that his wife is stable and healthy and pursuing her passion in nursing

while he is able to be an active father to his daughters.

The record contains mental health documentation establishing the Applicant's spouse's struggles with anxiety and depression, her past suicide attempts and hospitalizations, and her current medication schedule and therapy participation to help treat her conditions. The record also contains evidence establishing the Applicant's spouse's participation in a graduate program, with a projected graduation date of May 2018, and the remaining clinical and didactic requirements that she must meet before she is able to graduate. The Applicant has also submitted documentation establishing that his children are receiving medical assistance through the Colorado Medicaid program. In addition, numerous letters have been provided establishing the hardships the Applicant and his spouse and children are experiencing as a result of the Applicant's inadmissibility.

The positive factors include hardship to the Applicant, his spouse, his three young children, and extended family members; the Applicant's payment of taxes; support letters on the Applicant's behalf from friends, family members, and his past employer; home ownership; the Applicant's expressions of remorse for his actions that led to his convictions in the early 1990s; the approval of the Applicant's Form I-192, Advance Permission to Enter as a Nonimmigrant; and the Applicant's apparent lack of a criminal record since 1993, almost 25 years ago. The negative factors are the Applicant's criminal convictions.

We find that the passage of more than two decades since the Applicant's criminal convictions, which occurred when he was a teenager, and the documented hardships to his spouse and family are of particular significance and outweigh the unfavorable factor in the Applicant's case. Thus, the balancing of the positive equities in this case against the negative factors warrants the favorable exercise of our discretion. Accordingly, we withdraw the Director's decision, as the waiver application merits approval.

ORDER: The appeal is sustained.

Cite as *Matter of K-E-P-M-*, ID# 658745 (AAO Jan. 5, 2018)